No. 84-1986

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN FINE, WILLIAM BECKER and PHILIP BECKER, Individually and WILLIAM BECKER and PHILIP BECKER d/b/a BECKER & BECKER, all doing business as 649 BROADWAY EQUITIES CO.,

Petitioners,

vs.

BELLEFONTE UNDERWRITERS INSURANCE CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Having failed in their repeated attempts to have the Second Circuit find merit in their claims and in an effort to avoid a repetition of the denial of their earlier "garden variety" petition for a writ of certiorari, which purported to present the question of the proper application of state law by a federal court (Pet., fn. p. 9; 105 S. Ct. 233 (1984)), petitioners now adopt the strategem of asking the Court whether it should "initiate error-prevention and error-correction procedures" in the lower federal courts, with "uniform exceptions to the 'law of the case' doctrine" and "uniform rules . . . for applying state law." This unique set of questions presented is premised on the assumption that "an acknowledged mistake" has been made and that this particular case "dramatically highlights" the desirability of developing procedures to correct what petitioners contend are inadequacies in the appellate review process.

It is ironic that the corrective procedures suggested by petitioners, who have unsuccessfully exhausted the existing appeal remedies, is to impose yet another layer of appellate review, so as to afford petitioners one more opportunity to plead their cause.

It is submitted that this case is a singularly inappropriate one on which to base a plea for revamping error-prevention and error-correction procedures in the federal courts for the simple reason that no error has been made in the courts below. The questions actually presented are:

1. Whether the District Court correctly held that absent a change of circumstances or newly discovered evidence, it was without power to order an evidentiary hearing on the issue of willfullness following the issuance of the mandate in the Court of Appeals directing entry of judgment for respondent and after two petitions for rehearing, one before the original panel and one *en banc*, seeking the same relief, had been denied by the Court of Appeals.

2. Whether the Court of Appeals, on appeal from the denial of petitioners' unsuccessful Rule 60(b) motion, was correct in

refusing to recall the mandate of the original panel where the alleged mistake of the original panel in disregarding New York law had been repeatedly urged in two petitions to the Court of Appeals for rehearing, a third petition for a rehearing and recall of the mandate, and in a petition for a writ of certiorari to the Supreme Court, all of which had been denied.

We submit that petitioners' real reason for seeking review by this Court does not involve any of the "Questions Presented" which are set forth in pages i and ii of the petition. In one of petitioners' petitions for rehearing in the Court of Appeals it was represented:

> Petitioner Martin Fine is a lawyer and businessman.
>
> His dealings with associates, third parties and public agencies are directly dependent on his reputation for honesty and fair play.
>
> This Court has, in its recent opinion, publicly branded Martin Fine guilty of perjury and fraud.
>
> From the tone of its opinion it is apparent that the Court gained the impression that Martin Fine was that most despised of human species – a heartless, greedy landlord. Wholly apart from the truth or falsity of that conclusion (which we obviously dispute), the Anglo-American legal tradition accords even the most vile malefactor a fair standard of proof on charges for which he stands accused.

Though these representations are not repeated in the present petition, it seems evident that the primary question presented here is whether this Court should review a unanimous decision of the Second Circuit affirming denial of a motion for a new trial following a prior unanimous decision of the Second Circuit (which had survived repeated petitions for rehearing and a petition for a writ of certiorari to this Court) in order to determine whether Martin Fine should be afforded yet another forum for attempted personal vindication.

DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Rule 28.1 of the Rules of the Court respondent submits the following statement:

The parent of Bellefonte Underwriters Insurance Company is Compass Insurance Company. The parent of Compass Insurance Company is Armco Inc. Subsidiaries (except wholly-owned subsidiaries) and affiliates of Armco Inc. are: Accerex; Aceros Del Sur S.A.; Aceros Nacionales, S.A.; Allied Investment Corporation; Armco Bundy ApS; Armco-Bundy Ror AB; Armco Industrial S.A.; Armco Armcopaxi; Armco Peruana S.A.; Armco (P.N.G.) Pty. Limited; Armco Westeel Inc.; Australian Steel & Mining Corporation Pty. Ltd.; P.T. Bakrie—Armco; Bienes de Capital Imsa, S.A. de C.V.; Big Three Lincoln (U.K.) Limited; Black River Lime Company; Bundy Venezolana C.A.; Carryore, Limited; Chatillon-Armco S.A.; Court Galvanizing, Inc.; Court Galvanizing Limited; D.I.F.S.I.C.A.; Equipetrol Administracao E Participacoes Ltd.; Equipetrol, S.A.; Equipetrol Norte Industria E Commercio Ltd.; Falconbridge Dominicana C. por A.; Charles Fulton (Asia) Holdings Ltd.; Charles Fulton (Australia) Pty. Ltd.; Charles Fulton (Malaysia) Sendirian Berhad; Charles Fulton (Singapore) Holdings Ltd.; Charles Fulton (Singapore) 1982 Ltd.; Herman Smith HITCO Ltd.; IMSA National, S.A. de C.V.; Industrias National Supply C.A.; Inmobiliara Hierro y Accro, S.A.; Mansion Management Services Limited; Marine Mineral Industries, Inc.; Metaltubos C.A.; Middletown Enterprises, Inc.; Minera Cerro de plata, S.A. de C.V.; Northern Land Company; Nuovi Tubi Brindisi SpA; Obras Civiles e Industrias C.A.; Oregon Metallurgical Corporation; Productos Metalicso Armco S.A.; Prolansa (Productora de Alambres y Derivados S.A.); Limited; State Surety Company; Technocargo-Transportes Especializados Ltd.; Torcad Limited; Winning Post Investments Ltd.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

In their statement of the case and elsewhere throughout the petition, petitioners rely on two basic false premises:

(1) That the decision of the New York Court of Appeals in *Deitsch Textiles, Inc.* v. *New York Property Ins. Underwriting Ass'n*, 62 N.Y.2d 999, 479 N.Y.S.2d 487, 468 N.E.2d 669 (1984), represents a new "intervening decision" (decided two weeks after

the District Court denied the Rule 60(b) motion) setting forth, for the first time, controlling New York substantive law that an insurance company must prove willfullness to void a fire insurance policy by reason of false swearing on an examination under oath.

The *Deitsch* case, involving false statements made by an insured in a proof of loss, does *not* represent new controlling law in New York. This was recognized by the petitioners in their earlier petition for certiorari in this case, where *Deitsch* is referred to as *reaffirming* a basic principle stated in *Jonari Management Corp.* v. *St. Paul Fire & Marine Ins. Co.*, 58 N.Y.2d 408, 461 N.Y.S.2d 760, 448 N.E.2d 427 (1983) (decided March 30, 1983) and earlier New York cases cited in the *Jonari* opinion. (See Petition in Docket No. 84-105, pp. 19-20).[1]

(2) More important is the petitioners' repeated flat assertion that "the first panel made a mistake" (in allegedly failing to recognize that willfullness is an element of the false swearing defense) and that the second panel in the decision now sought to be reviewed recognized that the first panel had made a mistake but refused to do anything about it.

These assertions distort the decisions below. The fact that there was not an express *finding* of willfullness does not mean that the first panel (or the second panel) overlooked or ignored the willfulness requirement.[2] Thus, the first panel in its decision reversing the trial court's determination that the false statements made by the insureds on the examination under oath were not material and directing judgment in favor of the defendant refers to the "obvious theory" being pursued by the insurance company on its

---

[1] Not being a new or intervening controlling authority announced for the first time by a state court after the initial Second Circuit decision in this case, *Deitsch* therefore could not be the basis for invoking the second exception to the law of the case rule set forth in the Fifth Circuit decision of *White* v. *Murtha*, 377 F.2d 428 (5th Cir. 1967), as claimed by petitioners (Pet. p. 20).

[2] We do note, however, that the first panel concluded that the false answers would be deemed material, "if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation." (B-12). Using that criterion, it is most difficult to conclude that the first Court of Appeals panel did not treat the willfullness issue.

examination under oath, suggested by the failure of the sprinkler system to operate during the fire and indications that the insured had followed a freeze-out policy in order to get rid of the tenants in the insured buildings. (B-6-8). The findings by the district court, referred to by the first Court of Appeals panel, of repeated instances of false swearing by both Fine and Peters on the examination under oath regarding sprinkler maintenance and heating practices, particularly with regard to the heat-timer settings, do not permit an inference of mistaken recollection; rather, the findings are consistent only with deliberate and willful false swearing sufficient to void the policy.

Indeed, as recognized by the second panel of the Court of Appeals in the decision now sought to be reviewed, a finding of false testimony or false swearing on an examination under oath implies willfullness. Thus, the court below in its decision noted that Black's *Law Dictionary* defines false swearing as "swearing knowingly and intentionally false and not through mere mistake" (Rev. 5th ed., 1979, p. 725; D-5). It should also be noted that the statutory provision provides for voiding the policy by reason of "any fraud or false swearing by the insured" relating to a material fact. New York Insurance Law, § 3404 (McKinney Special Pamphlet 1984 and Supp. 1984-85 (original codified as §168.) The statute is silent as to whether there must be willful false swearing (in contrast to instances of concealments or misrepresentations), doubtless because a finding of false swearing necessarily implies willfullness. Here, of course, we have the necessary prerequisite to void the policy by the finding that both Fine and Peters swore falsely on the examination under oath as to material facts under circumstances which preclude innocent mistake.

COUNTER-STATEMENT OF THE FACTS

Petitioners have attached as Appendix E to the petition the same recitation of the purported "Statement of the Facts" as contained in their brief to the second Court of Appeals panel. Without attempting to correct the many irrelevancies and distortions in that recitation,[3] the essential facts before this Court and the Court of Appeals can be reduced to the following:

The District Court found that petitioners, by Messrs. Fine and Peters, had testified falsely on their examination under oath concerning sprinkler maintenance practices and temperature settings, but nevertheless held for the petitioners under the mistaken notion that such false swearing did not concern material facts. On appeal, the first Court of Appeals panel held that such false swearing by petitioners did concern material facts, and therefore reversed the decision of the District Court and "remanded to the District Court with instructions to enter judgment for the defendant." (Pet. App. B-3).

In two petitions for rehearing, one addressed to the original panel and one requesting a rehearing *en banc*, petitioners raised the argument that the Court of Appeals had failed to consider that the District Court had not made any express finding that their false swearing on the examination under oath was "willful" and "with intent to defraud" the insurer, both of which, petitioners maintained, were required under governing New York law.

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[3] For example, petitioners make the gratuitous and completely unfounded suggestion that the cause of the fire was "tenant arson" (Pet. App. E-6). The fire department official who speculated that there may have been arson would be surprised to find his suspicion directed away from petitioners.

And the implication that the sprinkler system in the fire buildings was operative is likewise bereft of any record support, as the District Court found that the sprinklers did not operate during the fire due to ice blockage (Pet. App. A-13). The plaintiffs' freeze-out policy included a complete shut-down of the furnace from 11 a.m. to 2 p.m. every day, and temperatures in the buildings were deliberately kept so low as to cause freeze-up of radiators and consistent complaints from tenants of lack of heat (Pet. App. A-9).

The petitioners asked in each petition that the case be remanded to the District Court for the purpose of clarifying its findings in two respects:

> 1. Did the District Court conclude that the "false" testimony of Fine and Peters concerning the temperature setting on the heat timer and the sprinkler maintenance instructions given to Aloisio was given "knowingly and willfully, with intent to deceive the insurer"?
>
> 2. If so, did the District Court reach that conclusion based on "clear and convincing proof" or simply based on a "preponderance of the evidence"?

In denying the second petition, by order dated April 24, 1984, the Court of Appeals stated:

> "A petition for rehearing filed herein by counsel for the plaintiffs-appellees – cross-appellants, Martin Fine, et al., and the panel that heard the appeal having denied said petition for rehearing in an order filed on February 21, 1984,
>
> It is further noted that a poll of the judges in regular active service having been taken on the suggestion for rehearing in banc and there being no majority in favor thereof, rehearing en banc is DENIED.

Petitioners then brought a motion in the District Court under Fed. R. Civ. P. 59 and 60(b) for a new trial or an evidentiary hearing on the issue of whether the false testimony given at the examination under oath was willful. The District Court denied the motion on the ground that "the Court of Appeals' rulings are the law of the case," and pointing out that petitioners had cited no material change of circumstances or newly discovered evidence which would warrant departure from the law of the case doctrine. Petitioners then appealed from the denial of such relief by the District Court to a different Second Circuit panel, which unanimously affirmed the order of the District Court.

Based on the foregoing facts, the affirmance by the Court of Appeals of the order of the District Court denying petitioners' motion was clearly correct, as was its admonition that petitioners "have more than had their day in court" and that their dissatisfaction with the result is "no reason to change the process of review fully afforded them. All disputes, including this litigation, must finally end." Petitioners' present petition for a writ of certiorari clearly does not implicate any matters that would warrant a reexamination of the appellate review process which petitioners seem to believe so important.

REASONS FOR DENYING THE PETITION

1. THERE IS NOTHING IN THIS CASE WHICH "DRAMATICALLY HIGHLIGHTS" OR "TYPIFIES" A NEED TO DEVELOP IMPROVED PROCEDURES FOR ERROR PREVENTION OR CORRECTION.

Petitioners argue that the Court of Appeals, in acknowledging that "it is not inconceivable that on occasion a judgment of this court may be in error," "threw down its gauntlet to this Court" (Pet. p. 12), to emphasize the alleged need for improved procedures to prevent error and thus improve the quality of appellate justice. Petitioners then criticize the effectiveness of petitions for rehearing, petitions for rehearing *en banc* and petitions for a writ of certiorari to this Court as not providing a "realistic chance" that error, however egregious, will be corrected (Pet. pp. 12-13).

Petitoners would therefore have this Court establish new rules discarding the petition for rehearing (because the decision-making panel is reluctant to correct its mistakes) and the petition for rehearing *en banc* (ostensibly because the case loads of the Courts of Appeals have increased so dramatically in recent years that such petitions are seldom granted). Though not presuming to suggest to this Court "the direction its initiative should take for more sweeping change in Court of Appeals procedures," petitioners nevertheless attach as Appendix F a number of suggestions, to wit, (1) that petitions for rehearing be directed to another panel (which could presumably reverse the first panel, requiring rehearing *en banc* to resolve any conflict, however trite, between panels),

and (2) that draft opinions be circulated to the parties for comment (because this procedure allegedly worked well in a "huge environmental case"). (Pet. App. F-2). Petitioners also complain that the District Court is powerless to correct "even the most outrageous holding of a circuit panel" (Pet., p. 14), and would presumably have this Court invest the District Court with the power to review and overturn the Court of Appeals where, in the opinion of a single District Court judge, there is error or "manifest injustice" in a decision of a superior tribunal.[4]

Though it seems improbable that these proposals would do anything more than create chaos, increase the burden on the courts and the time to complete the appellate process, regardless of the desirability or lack of desirability of the proposed error prevention or correction procedures, this case is certainly not a "lodestar" or the "perfect case" for the Court to embark on a reexamination of existing appellate procedures (Pet. p. 8), and it certainly does not typify whatever need may be said to exist to develop such procedures (Pet. Caption, Point 1, p. 11). There simply has not been a "mistake" either on the part of the initial panel in holding that the policy is voided by false answers on an examination under oath concerning matters relevant to the insurance company's investigation (occurring under circumstances which preclude mistake and, by definition, were "knowingly and intentionally false and not through mere mistake") or in denying petitions for rehearing and recall of the mandate, or by the entire Second Circuit in denying the petition for rehearing *en banc*, or by this Court in denying the first petition for a writ of certiorari, or by the District Court in denying petitioners' Rule 60(b) motion, or by the second Court of Appeals panel in affirming the District Court's denial of the 60(b) motion and declining to reverse the prior decision of the first panel, pointing out that petitioners "have more than had their day in court."

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[4] The logical extension of this modest proposal, of course, is that a Court of Appeals or District Judge could ignore the mandate of this Court to ameliorate what is perceived to be "manifest injustice."

2. THE DECISION BELOW CORRECTLY APPLIED THE LAW OF THE CASE DOCTRINE IN AFFIRMING THE DECISION OF THE TRIAL COURT AND REFUSING TO DISTURB THE DECISION OF THE FIRST PANEL.

Petitioners maintain that both the District Court and the Court of Appeals adopted a "wooden and inflexible" formulation of the law of the case doctrine which is contrary to that applied in other circuits. The argument is that the law of the case doctrine applies only with respect to issues determined in the litigation and that an essential issue in this case, *i.e.*, whether plaintiffs had willfully sworn falsely, had not been determined earlier in the lawsuit.

We have seen that the initial Court of Appeals decision, in holding that plaintiffs repeatedly swore falsely concerning material facts on an examination under oath, did in fact satisfy the willfullness requirement of New York law so that no new express finding in this regard was necessary. The initial Second Circuit panel specifically noted that willfullness was an element of the false swearing defense (*e.g.*, B-10-11), and determined that respondent had established that defense. To argue that the first Court of Appeals panel had disregarded the issue, especially after the willfullness argument had been raised on no less than three unsuccessful post-appeal motions and a petition for certiorari, is to engage in fantasy.

And even if it could be said that the question of willfullness was not expressly considered by the initial Second Circuit panel,[5] notwithstanding petitions for rehearing and rehearing *en banc* which centered on the issue of willfullness, the second Court of Appeals panel quite properly deferred to the decision of its predecessor panel. Once an issue is decided, either expressly or

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[5] Having considered numerous false statements under oath by two witnesses, it is most difficult to conceive of any court determining that these statements were anything but willful. Clearly, when a person utters a host of false statements on material points, the law may properly infer willfullness and an intent to deceive. *See Claflin v. Commonwealth Insurance Co.*, 110 U.S. 81, 95 (1884).

by necessary implication, that decision should govern in subsequent stages of the same litigation in the absence of extraordinary circumstances. *Arizona v. California*, 460 U.S. 605 (1983); *Fogel v. Chestnutt*, 668 F.2d 100, 108 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982). At the very least, the willfullness issue was decided by the Court of Appeals "by necessary implication."

This principle is uniformly adopted in the various circuits, and is not confined only to the Second Circuit, as petitioners maintain. *E.g.*, *United States v. DeJesus*, 752 F.2d 640 (1st Cir. 1985); *Doe v. New York City Department of Social Services*, 709 F.2d 782 (2d Cir. 1982), *cert. denied*, 104 S. Ct. 195 (1983); *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981), *cert. denied*, 455 U.S. 944 (1982); *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981); *Petition of United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Holcomb v. United States*, 622 F.2d 937 (7th Cir. 1980).

The law of the case doctrine is dramatically illustrated in the decision of the Third Circuit in *Seese v. Volkswagenwerk A.G.*, 679 F.2d 336 (3d Cir. 1982) (per curiam). There, a car accident in North Carolina gave rise to a diversity action brought in New Jersey District Court. The jury found for the plaintiffs on two claims, one based on a theory of strict liability and the other based on a theory of negligent design. On appeal, the Third Circuit held that North Carolina would not recognize the theory of strict liability, but would recognize a negligence cause of action. The Third Circuit then denied the defendants' petition for a rehearing.

Thereafter, the Fourth Circuit Court of Appeals ruled that North Carolina would not recognize the negligence theory advanced by the plaintiffs, and based on that Fourth Circuit decision the defendants moved for a stay of the Third Circuit mandate and for leave to file another petition for rehearing. The Third Circuit denied this motion as well, and the defendants then returned to the district court, moving under Rule 60(b) to vacate the original judgment. The district court ruled that the Third Circuit mandate was final and that it was without jurisdiction

to entertain the motion. In affirming that decision, the Third Circuit stated that a district court is powerless to alter the mandate of an appellate court "on the basis of matters included or includable in defendants' prior appeal." 679 F.2d at 337. The Court specifically stated that this Court's decision in *Standard Oil Co. v. United States*, 429 U.S. 17 (1976) (per curiam), was not to the contrary:

> The [Supreme] Court in *Standard Oil Co.* stated that, "the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not flouting the mandate by acting on the motion." [429 U.S. at 18] In the present case, however, the basis of the Rule 60(b)(6) motion was before this court and the Supreme Court, and thus could not be considered by the District Court.

679 F.2d at 337, n.1.

There are, to be sure, limited instances where before direct appeals have been exhausted departure from the law of the case doctrine may be warranted, *i.e.*, where the evidence on a subsequent trial is substantially different, or there has been an intervening change of controlling law or the prior decision was clearly erroneous and would work a manifest injustice. *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). Contrary to petitioners' claims, the Second Circuit has indeed recognized that, in a proper case, there can be departure from the law of the case if there are "cogent" and "compelling" reasons to do so. *Doe v. New York City Department of Social Services*, 709 F.2d at 789; *Fogel v. Chestnutt*, 668 F.2d at 108. What petitioners have refused to recognize, however, is that theirs is not a situation which would warrant such a departure.

As noted, the false premises underlying petitioners' claims render their arguments inapposite. *Deitsch Textiles* is not a new formulation of the law; it merely restated general, well-accepted propositions. Moreover, it is obvious that the issue of willfullness was indeed before the first Court of Appeals panel on the direct

appeal and on the petitions for rehearing and before this Court on the first petition for certiorari.

Having exhausted their rights of direct appeal, petitioners mounted a collateral attack on the mandate of the first Court of Appeals panel under Fed. R. Civ. P. 59 and 60(b). Under these circumstances, the District Court, even if it perceived that the Court of Appeals had made a mistake and that there has been a miscarriage of justice, cannot ignore the mandate of the Court of Appeals and, in effect, overrule the court to which it owes obedience. An ordered system of justice demands no less. Arguments in support of a departure from a mandate of the Court of Appeals must be addressed to the Court of Appeals by petition or motion to recall the mandate. 1B J. Moore, J. Locas and T. Currier, *Moore's Federal Practice*, ¶ 0.404[10] (2d ed. 1984). It would be all the more improper for the trial court to depart from the mandate where, as here, petitioners had already been denied such relief by the first Court of Appeals panel and by the Court *en banc*.

The court below noted the following chronology of events in this case preceding its decision. (Pet. App. D-7):

January 3, 1984	- panel decision handed down that reversed the district court judgment
January 30	- appellants' motion to have entire transcript of the examination of Fine and Peters filed with the court granted
February 22	- petition for rehearing before original panel denied
April 24	- petition for rehearing in banc on the basis that the district court had not found that false testimony was willfully made denied.
May 1	- mandate of this Court issued
June 15	- motion in district court before Judge Sweet for Fed. R. Civ. P. 60(b) relief denied

September 12	- notice of appeal from denial of 60(b) relief filed
October 1	- petition to the Supreme Court for certiorari denied
October 18	- application to original panel for leave to file a second petition for rehearing, recall of the May 1 mandate and consolidation of the previous appeal with an appeal from denial of 60(b) relief denied
January 12, 1985	- oral argument before the present panel (only Judge Oakes was on the previous panel) seeking reversal of denial of 60(b) relief.

Faced with the foregoing chronology, the court below correctly noted that the original panel, having denied two petitions for a rehearing based on this same willfullness argument, "must be presumed to have considered it," citing the Eighth Circuit decision in *NLRB* v. *Brown & Root, Inc.*, 206 F.2d 73, 74 (1953), *enforced*, 311 F.2d 447 (8th Cir. 1963). *See also Key v. Wise*, 629 F.2d 1049, 1055 (5th Cir. 1980), *cert. denied*, 454 U.S. 1103 (1981) (law of the case doctrine applicable unless earlier decision is "necessarily inconsistent with every possible correct basis").

At some point all things, even litigation, must come to an end. If anything, the history of this action demonstrates that a well heeled or obsessive party can prolong a case for years after what should have been its final conclusion. Law of the case and other related doctrines serve to guard against seemingly interminable litigation, while at the same time preserving an escape hatch which allows for departure in an exceptional case. But even in an exceptional case (and this is certainly not one of them), there must be some point at which the prevailing party can be free to enjoy the fruits of victory. That is why the judicial process quite properly is structured to afford litigants numerous opportunities to correct perceived error on direct appeal, but severely limits the avenues of relief on a collateral attack once the direct appeal process has been exhausted.

Petitioners' plaintive cries that the Second Circuit has arrogated to itself an imperial attitude of never admitting or correcting "mistakes" it has made to the contrary notwithstanding, the fact is that no Court of Appeals will depart from the law of the case because of any change in the law where the direct appeal process has been exhausted. In each case where a Court of Appeals has departed or endorsed in theory departure from the doctrine, the action had not been finally concluded. *E.g.*, *White v. Murtha*, *supra*; *Doe v. New York City Deptartment of Social Services*, *supra*; *Zichy v. City of Philadelphia*, 590 F.2d 503 (3d Cir. 1979) (new, contrary controlling law); *Delano v. Kitch*, 663 F.2d 990 (10th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982) (new, contrary controlling law); *Johnson v. Bernard Insurance Agency, Inc.*, 532 F.2d 1382 (D.C. Cir. 1976) (new evidence on retrial after remand); *Otten v. Stonewall Insurance Co.*, 538 F.2d 210 (8th Cir. 1976) (new evidence on retrial after remand). Where, however, as in this case what is reputed to be a change in controlling law occurs after direct appeal and while a collateral attack on the final judgment is being mounted, the final judgment must stand. *E.g.*, *Seese v. Volkswagenwerk, A.G.*, *supra*; *Trice v. Commercial Union Assurance Co.*, 397 F.2d 889 (6th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969).

In short, there is no real conflict among the circuits, and nothing warranting this Court's review, in the application of the law of the case doctrine under the circumstances presented here.

3. THE COURT OF APPEALS CORRECTLY APPLIED NEW YORK LAW IN ADHERING TO THE LAW OF THE CASE, IF NEW YORK LAW WAS EVEN REQUIRED TO BE APPLIED

Petitioners devote considerable attention to the proposition that the Second Circuit should have applied the New York rules on law of the case, rather than "arrogating" to itself the right to utilize what is claimed to be its own unique version of that doctrine. (Pet. pp. 25-28). We do not believe it productive to discuss whether application of the law of the case doctrine is "substantive" or "procedural" for purposes of *Erie R.R. v. Tompkins*, 304 U.S. 64

(1938).[6] For as set forth above, the Second Circuit's formulation and application of the doctrine comports with that of every other circuit; as we shall demonstrate, the doctrine in New York is applied no differently.

We have seen that *Deitsch Textiles, Inc. v. New York Property Ins. Underwriting Ass'n, supra*, does not represent a subsequent, intervening change in decisional law, but is merely a reaffirmation of well settled principles. Thus since willfullness was always an element of the false swearing defense, this Petition for Certiorari can be seen to be nothing more than yet another attempt by a disappointed litigant to again have some court align itself with his position after all avenues of direct appeal have been exhausted.[7]

But even if the decision in *Deitsch Textiles* constituted a change in decisional law and if the Second Circuit was bound to follow the New York formulation of the law of the case doctrine, petitioners have still failed to demonstrate error by the court below much less any of the considerations listed in Rule 17 which would lead the Court, in the exercise of its discretion, to grant certiorari.

While relegating discussion of the New York formulation of the law of the case doctrine to an abbreviated footnote, petitioners

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[6] Of course, this is not the first time that petitioners have accused the Second Circuit of doing violence to the *Erie* doctrine. In their first Petition for a Writ of Certiorari, No. 84-105, petitioners unsuccessfully attempted to persuade this Court that, in determining that petitioners had falsely sworn on a material issue under oath, the Second Circuit chose "not to apply the New York law but instead formulated a contrary federal rule and then applied it to this case" (p. i). That claim was shown to be, as we are confident petitioners' current assertions will be found to be, without merit.

[7] In their first Petition for Certiorari, for example, petitioners maintained that the failure of the first court of appeals panel to address the issue of willfullness was "contrary to a long line of decisions of New York State's highest court." (p. 19). And the second Court of Appeals panel recognized that in *Deitsch Textiles*, "the New York Court of Appeals reaffirmed . . . that in addition to materiality, an insurance company must prove willfullness to avoid a fire insurance policy." (D-5).

nevertheless maintain that a New York State court would have come to a contrary conclusion than that of the Second Circuit. Petitioners are wrong. To be sure, the law of New York, as does the law of the Second Circuit, provides that a change in decisional law will usually be applied during the normal appellate process. *Compare Fogel v. Chestnutt, supra, with Gurnee v. Aetna Life & Casualty Co.*, 55 N.Y.2d 184, 448 N.Y.S.2d 145, 433 N.E.2d 128, *cert. denied*, 459 U.S. 837 (1982), *and Gager v. White*, 53 N.Y.2d 475, 442 N.Y.S.2d 463, 425 N.E.2d 851, *cert. denied sub nom., J.E. Guertin Co. v. Cachat*, 454 U.S. 1086 (1981).

Where, however, as here, what is represented to be a change in decisional law occurs after direct review, the law of the case doctrine will preclude departure from the earlier decision. *People v. Pepper*, 53 N.Y.2d 213, 440 N.Y.S.2d 889, 423 N.E. 2d 366, *cert. denied*, 454 U.S. 967 (1981). New York holds, therefore, that a decision from which the right of direct appeal has been exhausted should not be disturbed by any court on the ground that a subsequent decision has overruled its own or another statement of existing law. *Matter of Huie*, 20 N.Y.2d 568, 285 N.Y.S.2d 610, 232 N.E.2d 642 (1967), *modified*, 21 N.Y.2d 1036, 291 N.Y.S.2d 14, 238 N.E.2d 503 (1968); *Deeves v. Fabric Fire Hose Co.*, 14 N.Y.2d 633, 249 N.Y.S.2d 423, 198 N.E.2d 595 (1964) (mem.).

Thus no matter whether under *Erie* the Second Circuit was bound to apply its own or New York's formulation of the law of the case doctrine, its decision is unimpeachable. The purported "change in existing law" occurred in the midst of petitioners' repeated attempts to have the decision of the first panel overturned. The "change" was brought to the attention of both the original Second Circuit panel and this Court, where it was claimed, as it is here, that the court of appeals had vitiated the *Erie* doctrine. All direct appeals were denied.

Petitioners also mounted a collateral attack on the mandate of the Second Circuit under Fed. R. Civ. P. 59 and 60(b)(1) on the selfsame issue that was the subject of the direct appeal, *viz.*, that a new trial should be held on the issue of the insureds'

willfullness in making the false statements. As that issue had been repeatedly raised on direct appeal, the Second Circuit most properly affirmed the District Court's adherence to the law of the case. All of the circuit Courts of Appeals and the courts of New York would have treated the issue no differently.

In the guise of a request that this Court formulate yet another layer of appellate review for the benefit of litigants who have invoked all possible avenues of direct appeal, petitioners in reality seek an additional opportunity to raise the same issue that has repeatedly been raised and rejected. But it does not follow from the fact that various panels of the Second Circuit and this Court have rejected petitioners' ceaseless entreaties that there exists some necessity "to improve the quality of appellate justice." (Pet. p. i). Indeed, the fact that petitioners have been afforded innumerable opportunities to plead their case leads to the opposite conclusion. Litigation must end some time, else the courts will be repeatedly subject to endless requests for relief by disgruntled litigants. We submit it is time for this Court to sound the death knell on petitioners' tired claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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